STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOSEPH JUSTICE, a/k/a JOSEPH SCHAFER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

STEPHEN SCHAFER,

Respondent-Appellant.

UNPUBLISHED
May 22, 2008

No. 280252
Ionia Circuit Court
Family Division
LC No. 05-000117-NA

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(ii), (g), and (j). We reverse.

Respondent's sole claim is that the trial court clearly erred in finding that the evidence sufficiently supported the statutory grounds for terminating his parental rights. We agree. To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). This Court reviews the trial court's determination for clear error. *Id*. at 356-357. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

In July 2005, the court assumed temporary custody over the child, then three months old, pursuant to the mother's plea to allegations concerning her substance abuse and mental instability contained in the original petition. None of the petition's allegations concerned respondent. In August 2005, the court, as part of its dispositional order, ordered both parents to comply with their case service plans and parent-agency agreements, which required respondent to participate in services to improve his emotional stability and parenting skills and maintain a "substance-free lifestyle." Thereafter, the parents complied with services, followed through with

recommendations to improve their parenting skills, and generally did well. In July 2006, the child was returned to the parents' home. On October 1, 2006, respondent and the mother—who was intoxicated although she was supposed to be caring for the child—purportedly had a domestic dispute. The police were involved but no charges were filed. Immediately thereafter petitioner filed a supplemental petition requesting the court to remove the child from the parents' home. The child was removed and placed back in foster care.

In December 2006, petitioner, through foster care case manager Jerianne Zaske, filed a termination petition. A termination trial was conducted on January 31, 2007. According to her testimony, Zaske had become involved in this case on November 20, 2006, and filed the termination petition on December 15, 2006. She observed one visit that respondent had with the child on December 22, 2006, after the termination petition was filed. Zaske's primary concerns were respondent's "substance abuse" and denial of fault with regard to the child's removal.

However, Dr. Thomas Spahn, a licensed psychologist who evaluated respondent, testified that there was no indication that respondent had any alcohol or substance abuse issues. A negative substance abuse assessment performed by Dennis Mintin also was admitted into evidence. Zaske admitted that there were no confirmed reports of substance abuse. The professional service providers who had worked extensively with respondent, including Deborah Conklin, Melissa Wagner, Diana Surrell, and Marion Lilly, testified that there was no indication that respondent had alcohol or substance abuse problems. In other words, Zaske's "substance abuse" concern was unsubstantiated.

Further, respondent's denial of fault for the removal of the child was supported by the evidence. The mother had confirmed substance abuse and mental health issues and was either unwilling or unable to parent the child which led to this adjudication. And her drinking while caring for the child on October 1, 2006, resulted in the child being removed from the home again. At the close of proofs, and consistent with the evidence presented at the trial, the court terminated the mother's parental rights but denied the petition with respect to respondent. The court noted respondent's concern for caring for the small child on his own and advised him that he needed "to take it to the next level and really make sure that you have that strong support in place." Further, the court requested that Zaske assign respondent a "father mentor."

Thereafter the child remained under the court's temporary jurisdiction and respondent began working towards reunification with the child by attending parenting classes and regularly visiting him. Zaske did not assign a father mentor to respondent. On June 22, 2007, respondent married Connie Mason, a woman he had known for about nine months. On July 9, 2007, Zaske filed a second termination petition with allegations including that respondent failed to (1) maintain a sober lifestyle, (2) address "co-dependency" issues, (3) take responsibility for the situation leading to the child's removal, (4) improve his parenting skills, and (5) maintain full-time employment. On August 24, 2007, another termination trial was conducted.

Again the evidence does not support Zaske's claims. First we consider Zaske's allegation that respondent failed to maintain a sober lifestyle. Despite the fact that Zaske's "substance abuse" concerns were unsubstantiated in the first termination trial, respondent was subjected to numerous unannounced, random alcohol and drug screens—including one at 7:30 a.m. on June 5, 2007. On that date, the screen came up positive for marijuana which respondent denied using, although he admitted he may have been around others who were using. Several screens before

and after that date were negative. There was no other evidence of marijuana use. Respondent has repeatedly denied having a substance abuse problem. As discussed above, not one professional service provider identified respondent as having an alcohol or substance abuse problem. No competent or persuasive evidence from the beginning of this case until its end supported Zaske's claim that respondent had an alcohol or substance abuse problem. Evidence that he drank beer on occasion—a legal and readily available beverage that many people enjoy in moderation on occasion—did not establish a "substance abuse" problem.

Zaske also claimed that respondent failed to address his "co-dependency" issues. David Beach, a professional counselor, testified that he provided three sessions of therapy to respondent before the program was cut from the budget. Based on the information he had, Beach identified "***possible*** co-dependency issues." In the first termination trial, Dr. Spahn testified that respondent *may* have a co-dependency issue in light of the fact that several women in his life drank excessively. Melissa Athmann, a licensed professional counselor and parent educator, testified that as part of her parenting classes she addressed underlying issues like co-dependency, relationships, and conflict resolution with respondent. Thus, to the extent any "co-dependency issues" existed, they were, in fact, addressed. Further, Athmann testified that any such issue of co-dependency would not prohibit respondent from parenting his son.

To the extent Zaske claimed that respondent's marriage to Connie Mason was the result of a "co-dependency" issue, it was without merit. Respondent testified that he had known Mason for nine months before they married and that she had raised her own children. There was no evidence that Mason drank excessively or that she was a substance abuser. Further, at the end of the first termination trial the trial court advised respondent "to take it to the next level and really make sure that you have that strong support in place." Respondent's marriage may have been an attempt to follow that advice. As Athmann testified, two-parent homes are healthier than single-parent homes. Athmann also testified that she was very impressed with Mason and that Mason's parenting skills were very appropriate.

Zaske also claimed, again, that respondent failed to take responsibility for the situation leading to the child's removal. As indicated above, the child's mother had confirmed substance abuse and mental health issues and was either unwilling or unable to parent the child which led to this adjudication. Her drinking while caring for the child on October 1, 2006, resulted in the child being removed from the home again. In any case, Beach testified that respondent did, in fact, accept some responsibility for his child being in foster care, and wanted to be reunified with his son.

Zaske also claimed that respondent failed to improve his parenting skills. In the first termination trial, Conklin testified that she observed respondent during parenting times and he did very well with the child. Wagner testified that she supervised many of respondent's visits with the child and he interacted very well and appropriately with him. Surrell testified that when she visited respondent's home, respondent would ask her appropriate questions on parenting and he interacted appropriately with the child. Lilly also testified at the first trial that respondent interacted very well with his child, that he was very appropriate, and that she had no concerns about his ability to parent his son.

In the second termination trial, Beach testified that respondent "certainly has the intellectual capacity to be a parent" and that he had no concerns about respondent's parenting

abilities. Athmann testified that respondent completed 15 hours of parenting class work for which he paid $50 an hour, and benefited from these classes. In fact, respondent showed the rare interest and initiative to take ideas from class, try them, and return to class with feedback as to the results. Athmann also viewed respondent and his son interacting and was "pretty amazed at the attachment they shared for each other." She opined that it was safe and appropriate for the child to return to respondent.

According to Zaske's testimony, respondent failed to appropriately discipline the child during parenting time. Respondent explained that because he only got to see the child for a short time, he did not want to spend his precious little time disciplining him. Zaske's testimony with regard to respondent's purported failure to discipline the child did not establish deficient parenting skills. And, according to Zaske, respondent's refusal to take the child for an overnight visit when the child was sick—which caused her to permanently suspend his right to overnight visits—was evidence of deficient parenting skills. But, as Athmann explained, the child had a fever and respondent merely wanted the child to be comfortable in his own bed. Athmann agreed with respondent's decision, which was premised on the child's best interests and comfort—not respondent's own. The unreasonable result of which was Zaske's decision to permanently suspend respondent's right to overnight visits.

Zaske also claimed that respondent failed to obtain full-time employment and, thus, "has not demonstrated that he can provide proper care and custody" to the child. Respondent testified that he was self-employed and had been for years. He had also been able to pay the bills and no evidence to rebut that fact was presented. He testified that he verified his income and he was financially able to support his son. Respondent testified in the first termination trial that his home was paid for and he had no debt. Zaske admitted that respondent owned his home, paid his utilities, and that there was no evidence that he had any financial difficulties. Thus, it is unclear as to why Zaske persisted in claiming that respondent could not provide proper care and custody for his child merely because he was not employed full-time.

Finally Zaske claimed that respondent's "lack of veracity directly impacts his ability to benefit from services." We have reviewed Zaske's allegations and believe they are greatly exaggerated. For example, that respondent reported on the written log that Zaske required he keep during unsupervised visits—where such log included accounting for almost every decision and action respondent made during the visit—that the child took a nap at a certain time and he, in fact, did not, does not cause us concern for the child's safety while in respondent's care. And that respondent claimed that he was digging a grave on a certain date and, in fact, the grave was not dug does not cause us concern for the child's safety.

We are concerned, however, with Zaske's handling of this case. It appears that from the moment she took over this matter, Zaske has had an unusual focus on terminating respondent's parental rights. For example, although several professionals have testified that respondent does not have an alcohol or substance abuse problem, Zaske persists in claiming that he does and has subjected him to numerous random screens. And, in a show of petty grievances, Zaske testified that she had concerns about respondent's parenting abilities because he bought Parents Choice diapers and not Huggies diapers. Further, Zaske continued to allege that respondent could not properly care for his child because he was not employed full-time yet she admitted that there was no evidence of financial difficulties. We have gleaned from all of the evidence and testimony received in this case that, no matter what respondent did in an attempt to reunify with his son,

Zaske would remain unsatisfied. This is unacceptable. Yet, somewhat surprisingly, the trial court followed Zaske's recommendation and terminated respondent's parental rights. We reverse.

In terminating respondent's parental rights, the trial court first indicated that, pursuant to MCL 712A.19b(3)(c)(ii), the conditions that existed that caused the child to come within the jurisdiction of the court included "the substance abuse, the emotional stability, parenting skills, and employment as the primary conditions." The trial court indicated that MCL 712A.19b(3)(g)—failure to provide care or custody—was the second basis under which termination was sought as a consequence of these same conditions. And the third basis for the termination sought was MCL 712A.19b(3)(j)—reasonable likelihood of harm if returned—as a consequence of these same conditions. The court concluded that all three statutory grounds for termination were established by clear and convincing evidence. We disagree.

"The fundamental right of a parent and child to maintain the family relationship can be overcome only by clear and convincing evidence." *In re JK*, *supra* at 212-213. That is, the factual allegations purportedly establishing a statutory basis for termination of parental rights must be shown by clear and convincing evidence to be true and to come within the statutory ground pleaded. See MCR 3.977(E)(3), 3.977(F)(1)(b), 3.977(G)(3). "Clear and convincing evidence is defined as evidence that "'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'"" *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000), quoting *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987). This evidentiary standard is typically thought to be the highest level that can be required in civil cases. *In re Martin*, *supra*.

First, we consider the trial court's conclusion that respondent had an "alcohol problem." Only Zaske made this claim. None of the professional service providers identified such a problem, including Dr. Spahn, Beach, Conklin, Mintin, Wagner, Surrell, Lilly, and Athmann. Indeed most of these providers specifically testified that there was no indication that respondent had an alcohol or substance abuse problem. For this reason, as well as the reasons discussed above, we conclude that this finding of fact is clearly erroneous because it was not established by clear and convincing evidence.

Second, the trial court concluded that the "co-dependency issue" was not rectified. As discussed above, in light of Dr. Spahn's and Beach's testimony we question whether a "co-dependency issue" was even established by clear and convincing evidence. However, if this condition did in fact exist, the evidence established that it has been addressed by Athmann and rectified. No evidence was presented that respondent was associating with women who drank excessively—which was the basis of Dr. Spahn's suspicion of co-dependency. And, further, as Athmann testified, any such issue would not impact respondent's ability to parent his child. No evidence to rebut that assertion was presented by petitioner.

Third, the trial court concluded that, to some extent, the parenting skills issue had not been rectified. Again, for the reasons discussed above, we conclude that this finding is clearly erroneous. We further note that because of Zaske's zealous efforts aimed at termination instead of reunification, respondent was denied opportunities to use and practice the parenting skills he

learned in class, as well as to develop more parenting skills typically acquired through interactions between parent and child. He was also denied the helpful guidance of a father mentor as a consequence of Zaske's failures.

And, fourth, the trial court concluded that respondent failed to obtain full-time employment. But as discussed above, all of the evidence reveals that respondent is financially responsible and financially able to take care of his child. Thus, even if this fact was established as true, there was no evidence that respondent's lack of full-time employment tended to establish any of the statutory grounds for termination pleaded.

Accordingly, the trial court's conclusion that termination of respondent's parental rights under MCL 712A.19b(3)(c)(ii), 712A.19b(3)(g), and 712A.19b(3)(j), premised on these four "conditions" was clearly erroneous. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In light of this conclusion, we need not consider the best interest factor. See MCL 712A.19b(5). This matter is reversed and remanded to the trial court. Additional efforts for reunification of the child with respondent are to be commenced immediately. In light of Zaske's persistent unacceptable behavior, we strongly recommend her removal from this case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Mark J. Cavanagh